Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-235

I. M. MOLEVER; MODERN MARTS, INC., a Pennsylvania Corporation; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Pennsylvania Corporation; BETTY BERNSTEIN; SHIRLEY L. WEINBERGER, as Custodian; DON D. BROOKS; and JEAN C. PARIS

Petitioners,

v.

STANLEY E. PREISER and JOHN F. BROWN, JR.,

Respondents.

BRIEF OF RESPONDENTS, STANLEY E. PREISER AND JOHN F. BROWN, JR., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

INDEX

Page

Counter Statement of Questions Presented 1

Counter Statement of the Case 2

Reasons for Denying Writ 8

The District Court Properly Converted 12(b) Motions to Rule 56 Motions and Gave the Petitioners Opportunity to Supply Evidence 8

The District Court's Judicial Notice was Proper..... 14

There Was no Unsanctioned Departure from Established Procedure or Principles Which Requires Intervention by this Court 18

Conclusion..... 19

Appendix A..... 1a

Appendix B..... 2a

Appendix C..... 18a

CITATIONS

CASES:

Baylis v. Travelers Ins. Co., 113 U.S. 320, (1885) 18

Ellis v. Cates, 178 F.2d 791 (4th Cir. 1949), cert. denied 339 U.S. 1964 (1950)..... 16

Fletcher v. Evening Star Newspaper Co., 133 F.2d 395 (C.A.D.C. 1942), cert. denied 319 U.S. 755 (1943)..... 16

Fountain v. Felson, 366 U.S. 681 (1949) 18

Page

Landy v. Federal Deposit Insurance Corporation, 486 F.2d 139 (3rd Cir. 1973) 17

Molever v. Levenson, 539 F.2d 996 (4th Cir. 1976) 2

Solely v. Star & Herald Company, 390 F.2d 364 (5th Cir. 1968) 15

MISCELLANEOUS:

Moore, Federal Practice, §59.12(3) 10

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Counter Statement of Questions Presented

1. Whether in granting summary judgment, the court below properly took judicial notice of the record in prior proceedings in that court?

2. Whether the petitioners were given an opportunity to supply evidence of the existence of a genuine issue of material fact upon conversion of a Rule 12(b) motion to a Rule 56 motion by the trial court?

3. Whether the decision of the appellate court below constituted an unsanctioned departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision?

Counter Statement of the Case

The seemingly endless history of this unique litigation begins with the filing of complaints in the United States District Court for the Northern District of West Virginia on behalf of I. M. Molever and others by attorneys other than the respondents herein, seeking damages for transactions occurring in the internal economy of the Bank of Wheeling, West Virginia, occurring in 1963-1968. *Molever* v. *Levenson*, 539 F.2d 996, 998 (4th Cir. 1976).[1]

Three civil actions were consolidated for trial, and they have been characterized as follows:

(1) An action under §10(b) of the Securities Exchange Act of 1934, and Securities and Exchange Commission Rule 10b-5 filed by one of the present petitioners, Molever, in 1970 (hereinafter Case I);

(2) A shareholders' derivative action filed in 1968 by the present petitioners, other than Molever (hereinafter Cases II(a) and II(b));

[1] The petitioners in the present litigation were the plaintiffs in *Molever* v. *Levenson;* the respondents were their attorneys at trial and upon appeal.

(3) A defamation action filed by one of the present petitioners, Molever, in 1967 (hereinafter Case III).

Following is a brief summary of the trial court results and the decision of the United States Court of Appeals in what is characterized as the "base litigation."

Case I: Action under §10(b) of the Securities Exchange Act of 1934.

District Court: Judgment for $59,496.00 in favor of one of the present petitioners.

Fourth Circuit: Judgment reversed and vacated.

Case II: (a) Shareholders' derivative action based on an alleged fraudulent "floor plan."

District Court: Judgment for $23,520.00 compensatory and $1,000,000.00 punitive damages against the then defendants.

Fourth Circuit: Judgment reversed with judgment entered for the then appellants.

(b) Shareholders' derivative action relating to the "Dennis Line Loans."

District Court: Judgment for $600,000.00 compensatory and $100,000.00 punitive damages against the then defendants.

Fourth Circuit: Judgment vacated and a new trial ordered thereon.

Case III: Defamation action by one of the present petitioners, Molever, against Robert and Donald Levenson, Abraham Pinsky and Joseph Gompers.

District Court: Verdict for plaintiff Molever against defendants Levensons, set aside; judgment n.o.v. entered for the then defendants only.

Fourth Circuit: Affirmed.

Subsequent to the adverse decision of the Court of Appeals, the petitioners herein filed their complaint against the respondents, Preiser and Brown, in the United States District Court for the District of Arizona, seeking as damages the amount of the jury verdicts rendered in the United States District Court for the Northern District of West Virginia, which were in excess of $5,000,000.00, together with damages for an alleged failure or refusal to file a defamation action against Abraham Pinsky, a member of the West Virginia Bar.

Upon the defendants' motion, the case was transferred to the United States District Court for the Northern District of West Virginia for all further proceedings, where the defendants filed 12(b) motions seeking dismissal, together with their respective answers and counterclaims.

The issues raised by the respective motions to dismiss were briefed and argued in the District Court on September 19, 1977, and at the hearing the District Court took judicial notice of the "base litigation," including the appeal therefrom to the United States Court of Appeals for the Fourth Circuit, the decision in which is reported at 539 F.2d 996 (4th Cir. 1976); converted the motions to dismiss to summary judgment motions, as authorized by Rule 12 F.R.C.P., and ordered the plaintiffs' action dismissed. The dismissal of Count I of the complaint was based upon a failure to state a cause of action upon which relief could be

granted; the dismissal of Count II of the complaint was based upon the applicable statutes of limitations.

Prior to the entry of the judgment order, the plaintiffs filed a factually unsupported motion for reconsideration under Rule 59, and a second factually unsupported motion for reconsideration was filed after the judgment order was entered.

The separate motions for reconsideration were accompanied by Memoranda of Points and Law, wherein the plaintiffs contended that they were "surprised" by the conversion to summary judgment.

Despite the alleged simplicity of the plaintiffs' position, it is of utmost significance that from September 19, 1977 (the date of the argument in the District Court), until December 14, 1977 (the date scheduled for argument upon the separate motions to reconsider)[2] petitioners made no effort to present to the District Court any evidence to support their contentions that there were material issues of fact which required jury determination.

The record in this case available to the District Court prior to December 14, 1977, was the entire record of the base litigation, which had been judicially noticed, and the conclusory affidavit of the plaintiff I. M. Molever, who, as a layman, advanced his conclusions that the defendant lawyers were negligent.

The significance of the abject failure of the plaintiffs to furnish the District Court with evidence of their far-reaching contentions contained in legal mem-

[2] As discussed hereinafter, the plaintiffs failed to appear for the scheduled argument either in person or by Arizona or local counsel.

oranda is heightened by the fact that the plaintiffs were advised of the hearing to be held upon the pending motions on December 14, 1977, by letter from the Clerk of the District Court dated October 31, 1977, which was after the plaintiffs had served and filed two motions for reconsideration of the District Court's order granting summary judgment (Respondents' Appendix B).[3]

The cavalier attitude of the plaintiffs toward the District Court, and, indeed, toward their motions for reconsideration, is reflected by the preamble to the mailgram-affidavit signed by I. M. Molever and tendered on behalf of the plaintiffs by Arizona counsel on the day of the hearing of the motions for reconsideration, which was:

> "In view of the foregoing, I called your secretary this morning and requested a continuance of the hearing on Plaintiffs' Motions now set for December 14, 1977 for two reasons: (1) In order that plaintiffs could thoroughly comply with your order of December 6, 1977 and (2) in order that someone from our firm could travel from Arizona to West Virginia in order to appear to argue the motions. Although I have contacted three other law firms in West Virginia in attempt to obtain counsel to appear on Plaintiffs' behalf tomorrow, no local counsel has been willing to make the appearance."

There is absolutely no question that the petitioners had been advised of the hearing on all pending motions by the letter dated October 31, 1977, yet their attorneys, one day prior to the long-scheduled hearing

[3] The letter provided in part: "This is to advise you that Judge Maxwell has scheduled a hearing on pending motions in the above-styled civil action on December 14, 1977, at 1:30 p.m. in the U. S. Courtroom in Wheeling, West Virginia."

upon their motions, sought a continuance "in order that someone from our firm could travel from Arizona to West Virginia in order to appear and argue the motions."

Despite their Rule 59 motions; despite the hearing on all pending motions scheduled by letter dated October 31, 1977; despite a period from September 19, 1977, to December 14, 1977, within which to demonstrate to the District Court genuine issues of material fact, the petitioners furnished no expert's affidavit demonstrating such issues nor have they identified any documentary exhibits which should have been admitted in the base litigation to support their allegations of material issues of fact. The only material filed in support of the plaintiffs' position is the affidavit of I. M. Molever, who concludes his lay dissertation on the practice of law and appellate procedure as follows:

> "4. Alternatively, in the event that it is determined that plaintiffs in fact had no claim against the defendants Levenson, et al. and defendants' negligence did not deprive plaintiffs of their remedies, such as, for example, because the release executed by the Bank of Wheeling in favor of the Levensons was valid notwithstanding the presumption of invalidity which defendants failed to adequately assert, affiant will prove that defendants were negligent in that the advice they gave plaintiffs to finance and continue the base litigation was negligently tendered and relied upon."

The courts below properly concluded that, absent any proper demonstration of material issues of fact, the motions for reconsideration should be and were properly denied.

Reasons for Denying the Writ

The District Court Properly Converted 12(b) Motions to Rule 56 Motions and Gave the Petitioners Opportunity to Supply Evidence.

The respondents filed separate Rule 12(b) motions (44a, 37a)[4] and at a hearing before the District Judge on September 19, 1977, those motions were converted to summary judgment motions (2a-26a) and a judgment order entered October 6, 1977 (27a).

In the course of the argument before the District Judge, counsel for the petitioners referred to summary judgment as being the best method for testing a claim (7a) and, after referring counsel to the right of all parties to a reasonable opportunity to present all material made pertinent to such a motion by Rule 56, the District Court directed preparation of a judgment order reflecting the granting of summary judgment for the respondents.

The only action taken by the petitioners subsequent to the argument of September 19, 1977, up until the date of a hearing scheduled for December 14, 1977, was to file two factually unsupported motions "pursuant to Rule 59, Federal Rules of Civil Procedure" (Respondents' Appendix A) seeking reconsideration of the District Court's granting of summary judgment.

[4] References designated (a) are to petitioners' Appendix.

The plaintiffs' pre-judgment motion was accompanied by a Memorandum Of Points And Law, which presented the argument:

> "Specifically, for examples, this Court, in the base litigation, entered a Judgment N.O.V. with respect to the jury award of damages for defamation. One of the Court's stated reasons for granting Judgment N.O.V. was that the evidence adduced at trial failed to show an abuse of privilege on the part of the defamation defendants. It is simply plaintiffs' position with respect to this decision of the Court that material evidence existed which abundantly showed abuse of privilege, but that defendant Preiser was so ill-informed regarding the law of defamation that he failed to recognize the significance of this evidence and that he improperly failed to introduce this evidence into the record. Similarly, it is plaintiffs' position that defendants inadequately argued to the Court those aspects of the proof of abuse of privilege which were indeed in the record and were sufficient to sustain the jury verdict, and the case law which supports its adequacy, all of which if properly performed would have effected this Court's ruling on the motion. This is the substance of plaintiffs' claims of malpractice, and plaintiffs are entitled to have a jury consider their merits."

No affidavit or proffer of any sworn testimony was made or served with the motion or the memorandum in support thereof which was served prior to the entry of the judgment order by the District Court on October 6, 1977.[5] Following the entry of the judgment order by the District Court, the plaintiffs served a

[5] The order resulted from the hearing of September 19, 1978.

second motion for reconsideration, dated October 20, 1977, which was again accompanied by a Memorandum Of Points And Authorities which referred to the earlier memorandum which was incorporated by reference. Again, however, no affidavit accompanied the motion, and no proffer of evidence to create a factual issue was made.

With regard to Rule 59(e), F.R.P.C., *Moore, Federal Practice*, §59.12(3) provides at page 59-253:

> "[3]—Serving Affidavits Pertaining to 59(e) Motions.
>
> "Rule 59(c) deals specially with the service of affidavits in connection with a motion for new trial. There is no comparable provision relative to a motion to alter or amend a judgment under 59(e). If, therefore, a party desires to support or oppose such a motion by affidavits, service should be in accordance with the general provisions of Rule 6(d)."

Apparently content to rest upon their two unsupported motions for reconsideration despite notice to the petitioners by letter from the District Court dated October 31, 1977, of a hearing scheduled for December 14, 1977 (Respondents Appendix B), the petitioners took absolutely no action to support their contention that genuine issues of material fact existed until receipt of the District Court's order of December 6, 1977 (Respondents' Appendix B), which *suggested* that the plaintiffs should be prepared to present their alleged factual issues at the hearing scheduled since October 31, 1977, 36 days prior to the entry of the order of December 6, 1977, and 44 days prior to the scheduled hearing date.

What the plaintiffs did undertake to do, however, was prepare an affidavit for execution by I. M. Molever, one of the petitioners herein, and transmitted that affidavit for receipt by the District Court prior to the hearing of December 14, 1977. No appearance at the hearing was made on behalf of the petitioners by their Arizona attorneys or by local counsel of record. The Molever affidavit was made a part of the record (Respondents' Appendix C).

It is clear that the petitioners slept upon their right to present facts which would have required the District Court to give consideration of their motions for reconsideration of the judgment. With admitted notice of the date and time of the hearing, with constant reference to surprise and the availability of "facts" to demonstrate a genuine issue of material fact, nothing was done by the petitioners. Rule 59 is clear. Petitioners exercised their right to use that vehicle to bring to the District Court's attention its alleged error. No factual issues were presented within the 86-day period from September 19, 1977, until December 14, 1977, despite the obvious willingness of the District Court to accept any meaningful evidence which would demonstrate an issue of fact.

The utter irresponsibility of the petitioners with regard to the Rule 59 F.R.C.P. motions is demonstrated by the record of the December 14, 1977, hearing. There the District Court stated:

> "We are sitting here now on December 14th, and we are talking about virtually ninety days and plaintiff's counsel have not come forward with any Rule 56 materials; they just haven't come forward with anything." (Respondents' Appendix B)

The petitioners made no effort to meet their burden to demonstrate genuine issues of material fact. They never had any intention of doing so and they had no intention of appearing at the hearing of December 14, 1977.

Certain allegations by the petitioners which are contained in their brief and which have appeared in one form or another throughout this litigation are deserving of comment.

Allegation

"The complaint was filed in the United States District Court for the District of Arizona—Molever's home and the locale of the original contract to render legal services." (Petitioners' Brief, p. 5)

Fact

The contract for legal services was entered into in the State of West Virginia.

Allegation

"[T]he District Court advised counsel that it would then take judicial notice of the entire earlier trial proceedings and the appeal to the Fourth Circuit (which materials were not and could not have been before the court) * * *" (Petitioners' Brief, p. 6)

Fact

Certainly the judicially noticed record and the appellate decision are sources whose accuracy cannot reasonably be questioned. [Evidence Rule 201(b)] and that is what is required by the Federal Rules of Evidence.

Allegation

"Plaintiffs requested the court to reconsider its ruling and to permit evidence on the issues of neglect, but the request was denied." (Petitioners' Brief, p. 7)

Fact

No proffer of any admissible factual evidence was ever made by the petitioners so as to create any issue of fact as to legal malpractice.

Allegation

The petitioners were given no opportunity to object to judicial notice by the District Court. (Petitioners' Brief, p. 8)

Fact

Ample opportunity *after* judicial notice was taken, was given the petitioners to object or to furnish a factual basis for contesting the propriety of judicial notice.

Allegation

The District Court substituted itself for the jury—substituted its opinion for those of properly qualified experts. (Petitioners' Brief, p. 8)

Fact

The petitioners tendered no expert opinion by affidavit or otherwise.

Allegation

The respondents totally failed to brief the issue of "known falsity" with regard to the defamation issue and did not brief, argue or refer to matters of "embellishment." (Petitioners' Brief, p. 15)

Fact

The defamation issue, in the base litigation, was the subject of an order for judgment for the respondents n.o.v. The issues were extensively briefed to the District Court and the Court of Appeals. No expert opinion as to the effect of such alleged failure was tendered.[6]

Allegation

"[T]he respondent lawyers admitted to Molever, that they never read the trial transcript in preparing the appeal." (Petitoners' Brief, p. 15)

Fact

This is simply not true and cannot serve by any stretch of imagination to create an issue of fact by its insertion in a self-serving affidavit filed in a vindictive effort to obtain satisfaction from the very lawyers who had obtained a judgment in the first instance in excess of five million dollars.

The District Court's Judicial Notice was Proper.

In the course of rendering its oral opinion, which was incorporated as its findings of fact and conclusions of law, the District Court took judicial notice of the "base litigation" and the decision of the Court of Appeals upon the appeal from the "base litigation."

> "So there we have a very interesting procedural undertaking in this case where both parties have resorted to a base case, we will call it, our Civil Action No. 74-2-W. That record, of course, is before the Court with all of the pleadings and with all of the exhibits and with all of the rulings

[6] See pp. 46-48 of respondents' brief in the appellate court below.

> and the 4500 pages of transcript. We have that entire record here and indeed, it seems that it is incumbent upon the Court in a matter of this nature, to judicially notice such a record since it is so intimately involved with the litigation that we have at hand.
>
> "Also, the Court must at least take judicial notice of the appellate record of the base case which was the entire record at the Court of Appeals for the Fourth Circuit. The Court with or without judicial notice is bound as is the law of the land, to obey that decision that came down from that appeal.
>
> "Let me now make a reference to that at this time and this is Molever v. Levenson and it is reported in 539 Federal Reporter, 2nd, 996. So, we have those matters and they are in this case." (Appendix, 11a)

The Petitioners made the "base litigation" and the appeal therefrom the predicate for their cause of action. The propriety of utilization of previous litigation in the same court by a court in a summary judgment proceeding is clear. "We are cognizant of the general rule which permits judicial notice of a court's prior cases to support a motion for summary judgment." *Soley* v. *Star & Herald Company,* 390 F.2d 364 (5th Cir. 1968).

Granted, in *Soley,* the Court of Appeals reversed a summary judgment, but in doing so pointed out that the District Court had not informed the parties as to what portion of the record it was judicially noticing. Such is not the case here. The Court, quite properly, took judicial notice of the entire record in the "base

litigation" as well as the decision of this Court upon appeal from that base litigation.

> "The controlling question raised on this appeal is whether the lower court, on a motion made for summary judgment, and in determining that there is no genuine issue as to any material fact, can take judicial notice of its own records in concluding the issue thus raised.
>
> "We take this to be too well settled to be seriously questioned." *Fletcher* v. *Evening Star Newspaper Co.*, 133 F.2d 395 (C.A.D.C. 1942) cert. denied 319 U.S. 755 (1943)

In *Ellis* v. *Cates*, 178 F.2d 791 (4th Cir. 1949), cert. denied 339 U.S. 1964 (1950), the appellate court had before it the question of the propriety of a refusal by a District Court to enter summary judgment on the plaintiff's motion when, in denying the motion, the District Court took judicial notice of proceedings had in prior litigation. The Court of Appeals approved the action of the District Court and stated at page 793:

> "The plaintiff argues that the court could not look to the record in the prior litigation in support of the motion for summary judgment; but we think there can be no question as to the correctness of the court's action in doing so. As we said in Morse v. Lewis, 4 Cir., 54 F.2d 1027, 1029:
>
> "'The general rule undoubtedly is that a court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put in evidence; and the rule is sometimes enforced with considerable strictness. * * * But in exceptional cases, as high authority shows, the dictates of logic will yield to the demands of justice, and the courts, in order to reach a just result, will make use of established and uncontroverted facts not formally of record in the pending litigation.'"

With regard to judicial notice and the propriety thereof, the Court stated in *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d 139 (3rd Cir. 1973), at p. 151:

> "* * * In the case sub judice, the justification for taking judicial notice is even greater because the subsequent developments were in the very court in which this suit was instituted, in a related matter, and merely involved notice of the filing of the new action and the parties thereto. This situation is similar to Pittsburgh Newspaper Printing Pressman's Union v. Pittsburgh Press Co., 479 F.2d 607 (3d Cir. 1973), in which we took judicial notice of subsequent arbitration and proceedings in the court of appeals. We also note that rule 201(f) of the Proposed Rules of Evidence for United States Courts and Magistrates, as explained by the Advisory Committee's Note, provides that judicial notice may be taken at any stage of the proceeding, even on appeal. 56 F.R.D. 183, 206."

Finally, with regard to the issue of judicial notice, it is clear that 201(c) and (f) of the Federal Rules of Evidence authorize a court to take judicial notice on its own motion at any stage of the proceedings. Any alleged failure to afford an opportunity to object to the notice was cured by the opportunity to appear and object at the December 14, 1977, hearing, concerning which the petitioners were advised by letter dated October 31, 1977. (Respondents' Appendix B) The petitioners not only did not appear for the scheduled hearing, they sought a continuance in order to

permit travel from Arizona to West Virginia when they previously had knowledge of the hearing since approximately October 31, 1977.

There Was no Unsanctioned Departure from Established Procedure or Principles Which Requires Intervention by this Court.

As stated in the opinion of the Court of Appeals, any claim of legal malpractice in the prior case must be based, *inter alia*, upon the record, briefs and arguments in that case (32a). Those records, briefs and arguments of which proper judicial notice was taken and which served as a predicate for summary judgment went unchallenged by the petitioners at the District Court level.

No factual challenge to the propriety of summary judgment was interposed at the District Court level and, absent such a challenge, any alleged deprivation of Seventh Amendment right to trial by jury does not withstand scrutiny. Granted, the safeguards which prevent violation of the right to trail by jury in summary judgment procedures are (1) notice and (2) the opportunity to present contrary evidence. *Fountain* v. *Felson*, 366 U.S. 681 (1949), *Baylis* v. *Travelers Ins. Co.*, 113 U.S. 320 (1885). Here, petitioners ignored their right to file evidence demonstrating factual issues despite the filing of two motions seeking reconsideration by the District Court and even failed to appear at a hearing scheduled 45 days in advance. If the petitioners had evidence it would have been produced and, absent such evidence of genuine issues of material fact, the courts below did not permit any deviation from accepted practice.

Conclusion

Now is the time to terminate this lengthy litigation which began by the filing of a complaint on behalf of the petitioners as early as 1967. It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. YEAGER
HERBERT G. UNDERWOOD
EDWARD W. EARDLEY

August , 1979

APPENDIX

Respondents' Appendix A

MOTION FOR RECONSIDERATION

Plaintiffs, by and through their counsel undersigned, hereby request the Court, pursuant to Rule 59, Federal Rules of Civil Procedure, to reconsider the entry of its Order dated October 6, 1977.

The attached Memorandum of Points and Authorities is submitted in support thereof.

DATED this 20th day of October, 1977.

TREON, WARNICKE, DANN & ROUSH, P.A.

By CHARLES D. ROUSH

Charles D. Roush
Francis G. Fleming
LaVerne Sweeney
Attorneys for Plaintiffs.

MOTION FOR RECONSIDERATION

Plaintiffs, by and through their counsel undersigned, hereby move the Court, pursuant to Rule 59, Federal Rules of Civil Procedure, to reconsider its decision to grant defendants summary judgment in the above-captioned matter. The attached Memorandum of Points and Law is submitted in support thereof.

Respectfully submitted this 30th day of September, 1977.

TREON, WARNICKE, DANN & ROUSH, P.A.

By CHARLES D. ROUSH

Charles D. Roush
Francis G. Fleming
Arthur G. Newman
Attorneys for Plaintiffs

Respondents' Appendix B

Whereupon, on the 14th day of December, 1977, in the U. S. District Courtroom in Wheeling WV, the above-styled matter came on for a hearing on motions and the following matters were had, to-wit:

PROCEEDINGS

THE COURT: In the matter of Modern Marts v. Stanley E. Preiser and John F. Brown, Jr., this being Civil Action No. 77-183-E, we will note the appearance of counsel for the Defendants and we will note no appearance by any of the counsel representing any of the Plaintiffs.

Just by way of filling out our record I would say that we had a telephone call yesterday which would have been the 13th of December, that counsel for Plaintiffs had not received this Court's order of an earlier date until that day. Later on however, we received some documents that had been sent out in response to that order, I think perhaps a day or two earlier than that. So, perhaps somebody might have misspoke in the telephone conversation and said, that they could not and would not be present.

Local counsel in this matter, Mr. LaVerne Sweeney, as we were informed by the Arizona counsel, was tied up, busy or something, and for some reason could not be here today either.

The Court had earlier ruled on several matters and the Plaintiffs were very insistent that the Court take up the motion for reconsideration. And this is the reason that we tried to schedule this matter and giving everybody ample opportunity to be present today.

Our correspondence file indicates that on October 31, 1977, a letter was addressed to Mr. Charles D. Roush, R-o-u-s-h, of Treon, Warnick, Damn & Roush, 100 West Washington, Suite 2250 Pheonix, Arizona and to Mr.

LaVerne Sweeney, 207 West Main Street, Grafton, West Virginia, William B. Birmingham, of Jennings, Strouss & Salmon, 111 West Monroe, Phoenix, Arizona. Also, a copy of this letter was forwarded to counsel for the Defendants, who are present here today and that letter says.

> "This is to advise you that Judge Maxwell has scheduled a hearing on *pending motions* in the above-styled civil action on December 14, 1977, at 1:30 p.m., in the U. S. Courtroom in Wheeling, West Virginia."

Now, certainly they got that notice. And Mr. Roush, of counsel for Plaintiffs, on November 2, 1977 filed a notice of appeal as to the Court's earlier actions, notwithstanding the motion at that time to reconsider.

We had understood however, from him, and perhaps this is documented in the file, that the notice of appeal was only and solely to preserve the possibility of time running against him in the event that this should be necessary.

On October the 20th, 1977, we received the Defendants' memorandum in opposition to the motion for reconsideration. In other words, the matters here had been developing all along and I don't believe it is necessary to chronicle the events too far.

The motion for reconsideration, and this is October 7, 1977, merely directs our attention to Rule 59 and asks for the reconsideration of the Court's decision to grant the Defendants summary judgment. And then they attached a memorandum of law in support of that.

On October 25, there was a motion for reconsideration filed by the same attorneys on behalf of the same Plaintiffs. And of course, it all relates back to the Court's order of October 6, 1977. And the Findings and Conclusions that the Court used to premise its order, and which narrated its reasons, was filed on September 18, 1977.

Counsel in pursuing their appeal and motion to reconsider and in their protestation of not having had notice

and time, are trying to misinterpret the Court's order of December 6th.

The order will speak for itself and is a chronology of what has happened in trying to establish an index out of the confusion of papers that have been filed here by Plaintiffs' counsel.

Also, it seems that from everything as presented by the Plaintiffs, both at our hearing of September 19, 1977, where the action was taken as memorialized by the order of October 6th, that the Plaintiffs urge that they were surprised by the summary judgment rule. It will be recalled that the Court was looking at Rule 12(b) and seems to be mandated to convert such motion, if appropriate, to a summary judgment proceedings.

It is difficult to understand how Plaintiffs' counsel can be surprised, when reference was made to an existing court record as the basis upon which the litigation was founded. I am sure that they are competent counsel and I feel reasonably sure in assuming that before bringing litigation of this nature, they would have read the testimony and record and the appelate court's decision and this Court's findings and order, so that they could not be taken by surprise.

However, be that as it may, let's look at this in a little bit more broader view and a little further view. They say they were suprised on this.

Well, the Court took its action on September 19, 1977 and we finally had an order entered, after some discussion and controversy, on October 6, 1977.

They filed immediately, well, on October the 7th was the date of the filing of the motion for reconsideration. And then again, on October 25th, they filed a motion for reconsideration. And again, all of this going back to this action and again, all premised upon the fact that they were taken by surprise.

We don't want anyone to ever be ambushed or taken by surprise. Now, we must look to the validity of their being taken by surprise or not. This is the problem that has been of grave concern to this Court.

We have to presume that they did their job and that they did their work and that they represented their clients in the accepted and traditional sense of the word.

Now, all through these proceedings they urge, at least by strong suggestion, if not in fact on the face of the matter, that if they had an opportunity to do something, they would have come forward with counter proposals that would have expanded the record and opened new vistas and suggesting liability that would go against these Defendants on the malpractice aspect of this case.

Now, we have to look at this realistically and in light of what has been done and *what is normally done instead of just what is said.*

Now, let's just ask ourselves a question here. If they were truely deprived on September 19, 1977 and didn't know that they were going to have to face anything other than the 12(b)(6) motion and notwithstanding the mandate of the last sentence, I believe of that provision. Then, what would diligent counsel normally do?

Well, it seems to this Court, this after twelve years of experience on the bench and having seen a lot of lawyers faced with comparable situations, that they would come forward with their offer of what they would have come forward with in a more timely fashion had they known about it.

We are sitting here now on December 14th, and we are talking about virtually ninety days and Plaintiff's counsel have not come forward with any Rule 56 materials; they just haven't come forward with anything.

So, the Court by this order of December 6th gave them the opportunity on the last page, after narrating all of these things to them and in the absence of the customary and usual, after thinking of a Rule 56 matter and they knew it was a Rule 56 issue on September the 19th, said to them, "Accordingly, it is ordered that Plaintiffs before December 14, 1977 at 1:30 p.m.—" and that is this day and hour—"When Plaintiff's motion for reconsideration will be heard by the Court in Wheeling, shall submit such materials as they deem appropriate for full consideration of the facts and law issues as presented and identified in the motions considered and acted upon by the Court on September 19, 1977."

Well, we did not have anything and that order, of course, went out immediately. It was on yesterday that we got the call saying that they had just received the order and they would not be able to be here and so forth. However, it was a day or two before that time—well, we have received in the office at Elkins since we left, certain documents and papers in this case that were dated and mailed a day or two before they said they first knew about it. So maybe that can be blamed on secretarial help or something of that nature. But anyway, it does not square with what they have told us.

This Noon, within the last hour or so, we have received what appears to be a rather lengthy Mailgram. And a copy of this was also sent to Elkins. By the way, the documentation that I just recently spoke of was mailed to Elkins, so we did not have the benefit of that, but apparently this is a copy of it and *it is asked that this be made q part of the record here and it will be. Everything that we have received in Elkins has been made a part of the record.*

Within the hour though in Elkins, we have received an affidavit from I. M. Molever delivered by Special Delivery Mail. And in talking with our secretary in Elkins and

reading back and forth, the Mailgram is apparently the same document that is included in this Mailgram.

So, as I say, this Mailgram will be made a part of the record also, and these other documents when we get to them, will be made a part of the record, also.

Let me take some time to read this over as we just received this.

(Whereupon, the Court does so.)

This goes on to say.

"This letter will memorialize the two telephone conversations I had with your secretary and law clerk, Pam Sargent, this morning." And this is dated 12-13 at 2:00 p.m., which is Mountain Standard Time.

"I received your order dated December 6, 1977 requesting that Plaintiffs submit affidavits and other materials in support of Plaintiffs' pending motions for reconsideration in the mail yesterday morning, December 12, 1977. Because of the fact that mail delivery between Arizona and West Virginia takes nearly three days, we were of the view that we did not have an adequate period of time in which to comply with your order; nevertheless, an affidavit was immediately prepared and sent to the Court yesterday by Special Delivery Mail. For your convenience, I am enclosing a copy of the text of the affidavit as part of this letter.

In view of the foregoing, I called your secretary this morning and requested a continuance of the hearing on Plaintiffs' Motions now set for December 14, 1977 for two reasons: (1) In order that Plaintiffs could thoroughly comply with your order of December 6, 1977 and (2) in order that someone from our firm could travel from Arizona to West Virginia in order to appear to argue the motions. Although I have contacted three other law firms in West Virginia in attempt to obtain counsel to appear on Plaintiffs' behalf tomorrow, no local counsel has been willing to make the appearance.

Your law clerk, Pam Sargent, returned my telephone request for a continuance and indicated to me that it was your position that no extension of time to comply with your order of December 6, 1977, or to arrange for an appearance by counsel for Plaintiffs at oral argument would be granted. Consequently, I must inform you that we take exception to your decision not to continue the hearing and in view of its request that the motions be decided on the basis of the written materials submitted.

I would respectively additionally request that a copy of this communication be made a part of the record on appeal to the Fourth Circuit. Sincerely—" And this is apparently signed by Mr. Roush.

Well, in the first place, there was no commandment in the order of December 6, 1977 for them to file anything. It was merely giving counsel the invitation to read the rule and to comply with the rule, if they had anything to comply with.

This does not appear to the Court to be any excuse for their failure to have done something in support of the motion for reconsideration or to respond to the Rule 56 matter, although they did have ninety days to do that.

I was only trying to, by this order, chronicle the case and to give them the opportunity that if for any reason they had overlooked the opportunity, to know that they were welcome to file anything, even right up to today.

And, of course, we do have the affidavit *by Mr. I. M. Molever, in support of the motion for reconsideration* which is attached to and made *a part of this.*

Let me just have this be made available to counsel and let you all read that and I would be glad to have any responses that you may have on the matter.

I will step out while you all look that over. (Whereupon, the Court left the bench and upon being notified by counsel they were ready to proceed, everyone returned to the court-

room and the following matters were had in open court, to-wit:)

THE COURT: All right, Gentlemen, do you have any thought after having read this exhibit?

MR. EARDLEY: If the Court please. We have compared the Mailgram with the affidavit that I received in the mail yesterday—well, not really mail, but by Federal Express, whatever that is; I don't know.

But for all practical purposes, I would say these are identical. And I would like to observe on the record that this affidavit, given by a layman, purports to draw legal conclusions more than to assert facts. And this is an attempt to bring a standard of care into the record that Mr. Molever couldn't possibly be qualified to express.

He is not a lawyer, but obviously is a very experienced litigator, but he is not trained in the law. I think that this affidavit is largely a group of legal conclusions and totally ridiculous assertions. Such things as Mr. Preiser failed to call the attention of the Court to the exhibits in the record. Well, as long as anything is in the record, one has to assume that the appellate court in its function, finds that and looks at it and considers it. I think that the record will speak for itself in the past.

This case was tried unbelieveably well. The verdict of the jury should be some measure of that. Mr. Preiser couldn't make the facts; he had to take them as he found them. And the decision of the Fourth Circuit, which we all know about, was only rendered after the Fourth Circuit had considered the entire record and a very voluminous and very good brief. And Mr. Molever is not qualified to criticize or to comment on any of those problems and that is largely what is in this affidavit.

Then when he gets through attempting to criticize everything that was done in this case, he arrives at the brilliant conclusion that he didn't have any case in the

first place, so Mr. Preiser was neglient for letting him go ahead with it, which is all incredible.

I just think this is an offense to the legal procedures and I would hate, if I were a practicing lawyer in Arizona or anywhere else, to have my name connected with such an affidavit.

Now, although I think that is not worthy of a reply, I talked to Mr. Preiser yesterday afternoon and he drafted a counter affidavit, which I have here. He disposes of most of this essay. I think that in the exercise of due care, we really ought to file Mr. Preiser's affidavit.

Now, technically I have not served this for it was just prepared about 6:00 o'clock last night.

THE COURT: Well, they should have been here. They had notice of this on October the 31st and a reasonable exercise of diligence in the practice of law and knowing what Rule 56 requires, that if you have anything to present—in light of this case and in light of their objections, they should have had these things in and be present and accounted for.

MR. EARDLEY: Well, as Mr. Underwood can tell you, they knew about this last week; there is no question about that. And they made up their minds not to come last week, not this week.

THE COURT: There is an old French Proverb, if I can recall it correctly, that says. "To accuse is to excuse." And that may have some application here.

MR. EARDLEY: Well, what I thought that I would do your Honor, is that I will serve this affidavit properly and send the original to your clerk. I will tender now, simply for your convenience, a copy of it.

THE COURT: That may be done.

MR. EARDLEY: You may have that to look at and then if you so desire, I will then serve this tomorrow and it will go the usual route and become a part of the record.

Otherwise, I don't have anything more to say about it.

MR. UNDERWOOD: Your Honor, as the record will reflect, I represent Mr. John F. Brown, Jr., in this situation. I did not as of 8:00 o'clock this morning have a copy of the affidavit of Mr. I. M. Molever in my office in Clarksburg. I learned of the existence of the affidavit at approximately 7:00 o'clock in the evening, last evening, when I spoke to Mr. Eardley by telephone. For that reason, I have not had an opportunity to prepare any response thereto in behalf of John F. Brown, Jr., the Defendant.

I would echo Mr. Eardley's evaluation of the content of the Molever affidavit. And while I do not believe that that affidavit serves to create any issue of fact or indicate the creation of any issue of fact by reason of Mr. Molever's lack of qualification to reach the ulitmate conclusion of being, whether Mr. Brown and Mr. Preiser acted in accordance with the standards for practice in this Court and in the United States Court of Appeals for the Fourth Circuit. Your Honor, I would like to have the opportunity, if I may, to prepare and to cause to be filed with this Court, and also, to be served upon Plaintiffs' counsel in Arizona, an affidavit on behalf of John F. Brown, Jr.

I would also like to state, at the invitation of Mr. Eardley, that I was advised, and this is purely upon recollection that I say this, but I was advised last week and it may have been before that time, by Mr. LaVerne Sweeney, who is local counsel for the Plaintiffs in this case, at approximately 5:10 in the evening while in my office in Clarksburg by telephone, that it was the intention of counsel for the Plaintiffs, including Mr. Sweeney, not to appear at the hearing as scheduled for this date.

At that time, it is my recollection, that I suggested to Mr. Sweeney that he advise the Court of that. By subsequent telephone call Mr. Sweeney advised me that he had spoken with the Court and that he did not know what their posture would be after that conversation.

With that I would have nothing further to say, but I would pray that on behalf of John F. Brown, Jr., the opportunity to file a response to the Molever affidavit.

THE COURT: I think it would be well to complete the record in these regards.

Miss Sargent, when did Mr. Sweeney call our office?

MISS SARGENT: It was sometime last week and we told him that the hearing was going on as scheduled.

THE COURT: What did he ask for particularly?

MISS SARGENT: A continuance, but he gave no reasons.

THE COURT: And you talked to him?

MISS SARGENT: Yes, sir.

THE COURT: And you told him that it was going on as scheduled?

MISS SARGENT: Yes, sir.

THE COURT: Then, I believe that according to the letter we have here, he did talk with you the other day about this.

Was Mr. Roush the person you talked to?

MISS SARGENT: It was Mr. Fleming with whom I spoke. I returned a phone call he had made to you, after he had then spoken with Mrs. Frey, your Secretary. He said, that they were not coming but gave no reasons therefore. He informed me that Mr. Sweeney would be out of town and again, gave no reasons therefore.

When I reported to him that it was your preference that this matter go on as scheduled, he again informed me that Plaintiffs' counsel would not be here and that they would rest on the matters already filed in evidence.

THE COURT: That was yesterday?

MISS SARGENT: Yes, sir.

THE COURT: December the 13th.

MISS SARGENT: December the 13th, 1977.

THE COURT: All right. Thank you.

Well, I don't understand this method of practicing law. I don't mean to be critical for maybe there is something about it that I don't understand. There may be situations that we do not comprehend, but it would seem to me that counsel for all parties, particularly the Plaintiffs in matters of this nature and on procedural questions of this type, have a very serious responsibility to get to the foundation issues quickly and thoroughly. And if there is something of a problem arising out of the base litigation then the responsibility is not to paper the narrative to death, but to point out precisely and exactly what the problem is.

If for any reason the Court was not mandated by Rule 12(b) to transform the 12(b)(6) motion to a summary judgment motion. We have had time after the fact for the Plaintiffs to come forward and to demonstrate to the Court that the Court acted improvidently and they obviously knew that they had that right because the day after the order was entered, some days after the action was entered, motions for reconsideration were filed and then later on, refiled. And they claimed that they only needed to have the opportunity to present a showing.

Well, we waited and we waited and then on December the 6th, the Court expressly invited them to file, even as

late as the hour of this hearing, and yet they backed away and wouldn't even come to Court today.

So, we don't know exactly what the problem is and we will not try to identify it further. We will just try to handle the issues as best we can. After all, the Defendants have certain rights, too.

It costs a lot of money to have counsel travel here and there, doing research and all of these types of things. And it seems to me that the Court has a responsibility not just to call balls and strikes, but to manage and to administer cases.

If we cannot get the cooperation of counsel from counsel for the plaintiffs or for defendants, then the Court has the responsibility to do that which is available to it and which accomplishes substantial justice as best can be done.

So we have given the Plaintiffs, it is believed, every opportunity to come forward and to try and develop their case. And they have failed to do so for reasons that are best known to themselves.

I don't understand Arizona counsel attempting to obtain local counsel at this late date when they already have local counsel. I don't understand that either.

So the Court has independently looked into this matter further and frankly, if there is any way that the Plaintiffs case could go to a jury, then this Court's philosophy is that it should. We deserve to have the best of the composite judgment of the jury, but as we look to this case and as we see the action as taken in the base litigation, we see the very thorough opinion on all of the issues in the Circuit Court of Appeals, *and we see the complete birth of ideas or suggestions as to the liability that has been raised here on the various pleadings in this* matter. Then indeed, the Plaintiffs' case here just fails; just fails terribly.

So, the Plaintiffs' motion then for reconsideration will be denied.

Also, the Plaintiffs have objected to the form of the judgment that was filed on October the 17th and that will be denied. And their motion for reconsideration of October the 25th, will be denied.

We also have pending the motion of the Defendants Brown and Preiser to strike the counter claim of Plaintiffs. That was filed with the reply to Defendant Preiser's counter claim. And it appears that these counter claims on counter claims are nothing more than a reassertion of matters, although poorly pled, a reassertion of that which the Court has already ruled upon and since the Plaintiffs' counsel have apparently not desired to pursue those matters either, those matters to strike will be granted.

Now, that should clean up everything that is now preliminary to the development of this case.

We have issues that are now ready to be developed and ready for development. Would 60 days be adequate for counsel for all parties to conclude discovery?

MR. UNDERWOOD: Your Honor, you find Mr. Eardley, Mr. Gray and myself in a peculiar position upon that matter, since we are retained for the purpose of strictly defense.

THE COURT: Of course, now I think your position is that of Plaintiffs, isn't it?

MR. UNDERWOOD: Yes. Essentially we are now Plaintiffs. It is my understanding and this is subject to correction, but I believe that Mr. Presier will now be handling the counter-claim as effective Plaintiff and that Mr. Brown will either handle his himself, or perhaps retain Mr. Preiser to do so for him.

So I would be hesitant to respond to the Court's question as to the 60 days without consultation with Mr. Preiser and Mr. Brown.

THE COURT: Well, let's do it this way. In our order of today we will provide that all discovery for all parties will be concluded and a thorough, complete pretrial order submitted say in 60 days on the issues that remain in the case.

Let's see, February the 14th—let me check that to be sure. All right, so that will be on the 14th of February, which is on a Tuesday.

We will then schedule the remaining matters for a trail at an earlier time after that.

Now, I have in Elkins—in your order, we will file the Mailgram that we have recievied here and in Elkins. We also have the affidavit of I. M. Molever, that was received this Noon in Elkins. Presumably this is the one that Mr. Eardley received yesterday.

MR. EARDLEY: Yes, your Honor.

THE COURT: So that would be the affidavit of December the 12th, 1977. And then, of course, we will file the affidavit of Mr. Presider, also.

Do you wish to have this Molever affidavit back?

MR. UNDERWOOD: If it please your Honor, for that is the only copy that I have at the present time.

Well, I don't believe there is anything more that we need to do here, except to develop this case on for further proceedings.

MR. UNDERWOOD: Your Honor, may the order also reflect the—what will occur insofar as Mr. Brown is concerned, the tendering and filing and service of an affidavit?

THE COURT: Yes, sir. That may be done.

I would really look to that not so much as to support the Court's action, but just completing our record and showing exactly what has occurred up to this time and that which we have talked about here today.

All right. There being nothing further then, we will stand in recess at this time.

(Whereupon, this concluded this matter at this time.)

Respondents' Appendix C

ORDER

On the 14th day of December, 1977, came the defendant Stanley E. Preiser, by Edward W. Eardley, his attorney, and the defendant John F. Brown, Jr., by Herbert G. Underwood and James D. Gray, his attorneys, there being no appearance of the plaintiffs either in person or by counsel, pursuant to the following:

1. Plaintiffs' Motions for Reconsideration of the entry of an order by this Court on October 6, 1977, said motions being filed on October 7, 1977, and October 25, 1977, respectively;

2. Plaintiffs' objections to form of judgment;

3. Defendants' motions to strike those pleadings of plaintiffs designated as "Counterclaims to Defendant Stanley E. Preiser's Counterclaim";

said motions having been set for hearing on the aforesaid date with due notice thereof having been provided to counsel for all parties.

Whereupon, in response to the opportunity provided by the Court for the submission by the plaintiffs of any materials customarily and usually considered on issues raised on a Rule 56 summary judgment motion which plaintiffs may not have had an opportunity to present at the September 19, 1977, hearing on defendants' motions to dismiss, the following were presented:

1. A mailgram informing the Court of the existence of an affidavit of plaintiff I. M. Molever and setting forth the contents thereof.

2. The affidavit of plaintiff I. M. Molever itself as reflected in said mailgram;

3. An affidavit of defendant Stanley E. Preiser in response to the affidavit of plaintiff I. M. Molever; all of

which are hereby ORDERED filed and made a part of the record herein, saving unto defendant John F. Brown, Jr., the opportunity to file an affidavit in response thereto.

In addition, the Court has been informed that there has been filed in the Elkins, West Virginia, office of the Clerk of this Court an affidavit executed by I. M. Molever, one of the plaintiffs herein, which affidavit is substantially identical to the recitation thereof contained in the aforementioned mailgram.

Whereupon, after due consideration of the aforesaid documents, together with the argument and briefs of counsel and other pertinent facts and circumstances, the Court is of the opinion that no genuine issue as to any material fact exists, and no inference giving rise thereto has been presented which would provide any basis or justification for a reconsideration of the entry of the Court's previous order on October 6, 1977; and further, that no additional reason or basis has been shown for reconsideration thereof.

Accordingly, it is hereby ORDERED that plaintiffs' Motions for Reconsideration, together with plaintiffs' Objections to Form of Judgment are hereby denied; and further, that defendants' motions to strike the plaintiffs' counterclaims to defendant Stanley E. Preiser's counterclaim are hereby granted.

It is further ORDERED that the opinion of this Court rendered on the 14th day of December, 1977, be transcribed and made a part of the record in this case and shall constitute this Court's findings of fact and conclusions of law.

It is further ORDERED that all discovery procedures with respect to the defendants' counterclaims shall be completed by February 14, 1978, and that a thorough pretrail order shall be prepared and filed on or before said date.

Enter: _____

_____

UNITED STATES DISTRICT JUDGE

ORDER

Among a series of motions filed by Plaintiffs in the above styled civil action, dated December 29, 1977, to which responses dated January 5, 1978 have been made by defendants, the Court finds that Plaintiffs seek a stay of further proceedings herein until the present state and status of the above styled civil action can be presented to the United States Court of Appeals for the Fourth Circuit upon Plaintiffs Notice of Appeal. To this particular motion the defendants have responded with defendant John F. Brown, Jr., moving that further proceedings, with regard to his counterclaim, be stayed until the determination of issues presently pending in this civil action before the United States Court of Appeals for the Fourth Circuit have been resolved. The Defendants, as counterclaimants, in their "Memorandum in accordance with Local Rule 2.07" do not object to plaintiffs Motion for a stay of further proceedings with regard to the counterclaim of Stanley Preiser until resolution of the issues presented by the appeal", and in addition, state "it is obviously appropriate, that the motion of the counterclaimant John F. Brown, Jr., likewise for a stay, should be granted.".

The consideration of these motions to stay proceedings becomes important and urgent since depositions are scheduled on Tuesday, January 10, 1978.

Upon consideration of all matters presented, it is ORDERED that all further proceedings in this Court, including the pursuit of discovery incidental to issues of fact and law